IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

CRL.A.No. 441 of 2003()

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SC.329/1999 of ADDL. SESSIONS COURT (ADHOC), KALPETTA

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APPELLANT: ACCUSED

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P.D.JAMES S/O. DEVASSYA, PADINJATTIN
KARA, THEKKUMTHARA P.O., KALPETTA.

BY ADV. SRI.GEORGE VARGHESE (MANACHIRACKEL)

RESPONDENTS: COMPLAINANT

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STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKEN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**J.M. JAMES, J.**

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Criminal Appeal No. 441 of 2003

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Dated this the 19th February, 2007.

**J U D G M E N T**

The accused in S.C.No.329/99, on the file of the Additional Sessions Court (Adhoc), Kalpetta, is the appellant. He was found guilty of the offence punishable under Section 55(a) of the Abkari Act, in short 'the Act', and, therefore, was convicted and sentenced thereunder, to undergo rigorous imprisonment for one year, and also to pay a fine of Rupees One Lakh, in default, to undergo further rigorous imprisonment for a period of six months. The same is under challenge through this appeal.

2. The brief facts of the case required for the disposal of the appellant are that, on 18.8.1998, at about 2 p.m., the appellant was found in possession of 5 bottles of Shivas XXX Rum, and another 5 bottles of Pump-D-XXX Rum of 750 ml. each, carried in M.O.3 big shopper within the Kalpetta Excise Range. Therefore, C.R.No. 14/1998 of Excise Range, Kalpetta, was registered, after seizing the contraband under Ext.P1 mahazar. Out of the 10 bottles, as stated above, one bottle from each brand were sent for chemical analysis.

Ext.P5 Chemical Analysis Report show that the samples contained Ethyl Alcohol of 42.39 and 42.33 percent by volume. Therefore, the appellant was proceeded against.

3. The prosecution examined 8 witnesses and marked 5 documents. Three material objects were also identified and marked. After appreciation of the same, the learned Sessions Judge convicted and sentenced the accused, as stated above.

4. When the appeal came up for consideration, the learned counsel appearing for the appellant, accused, relying on **Krishnankutty v. State of Kerala** *(2005 (3) KLT 568),* submitted that out of ten bottles, only two bottles were sent for chemical analysis, and, therefore, it cannot be said that the remaining bottles were of liquor, as defined under Section 3(10) of the Act.

5. Ext.P5 chemical analysis report reveal that only two bottles, each from the Shivas XXX Rum and Pump-D-XXX Rum, were sent for analysis. M.Os. 1 and 2 series are the remaining bottles of the liquor seized. Counsel for the appellant submits that permitted quantity at the relevant period, when the occurrence took place, was 1.5 litres.

Therefore, the prosecution has proved only two bottles of 750 ml. each brand having possessed by the appellant. Without proving that the remaining bottles of M.Os. 1 and 2 are also liquor under Section 3(10) of the Act, the court below was not correct in holding that the entire 10 bottles seized from the appellant was liquor, and, therefore, he was in possession of liquor in excess of the permitted quantity of 1.5 litres.

6. No reason is given or explanation offered as to why only one bottle from each brand was sent for chemical analysis, and the remaining bottles were not subjected to chemical analysis. Therefore, as rightly argued by the learned counsel, the prosecution has proved that the petitioner was in possession of 1.5 litres of Rum, 750 ml. each of Shivas XXX Rum and Pump-D-XXX Rum, which is within the permitted quantity, which a person can possess. Though M.Os. 1 and 2 are produced, the same cannot be accepted as liquor, unless the same is tested and proved that they are liquor. Merely because the same label of the brand, as that of two bottles tested under Ext.P5 are seen pasted on the bottles of M.Os.1 and 2, will not enable the prosecution to content that M.Os.1 and 2 are also that of the same brand, as that were subjected to analysis through Ext.P5. This fact has been discussed in Krishnankutty's case cited above,

following the High Court rulings. Therefore, I find no reason to take an another view than the one taken in Krishnankutty's case, supra. Thus, the prosecution has proved that the appellant was only in possession of 1.5 litres of illicit liquor, which was within the permitted quantity, and, therefore, the conviction and sentence holding that the petitioner was possessing in excess of the permitted quantity of 1.5 litres, as alleged in the charge and as spoken to by the prosecution witnesses, cannot be accepted.

7. Therefore, in the above legal and factual situation, I set aside the impugned judgment of the Additional Sessions Court (Adhoc), Kalpetta, in S.C.No.329/1999. The conviction and sentence passed on the appellant, accused, are set aside. The appellant, accused, is set at liberty forthwith cancelling his bail bond.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.

**J.M. JAMES, J.**

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Criminal Appeal No. 441 of 2003

**J U D G M E N T**

Dated: 19th February, 2007.

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